IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 24, 2008

STATE OF TENNESSEE v. NICHOLAS A. OVERBAY

Appeal from the Criminal Court for Sullivan County
No. S50,449 Jon K. Blackwood, Judge

No. E2007-02478-CCA-R3-CD - Filed February 18, 2009

Appellant, Nicholas A. Overbay, was convicted by a Sullivan County Jury for first degree murder and attempted first degree murder. He was sentenced to life imprisonment for the first degree murder conviction and received a concurrent twenty-year sentence for the attempted first degree murder conviction. Appellant argues on appeal that the trial court: (1) improperly denied a motion to suppress; (2) improperly refused to change the venue of the case; and (3) erroneously allowed a crucial State witness to testify after the witness was permitted to view portions of the trial on live Court TV while waiting to testify. Appellant also contends that the evidence was insufficient to support his convictions. We hold that the motion to suppress physical evidence seized as a result of Appellant's un-Mirandized statement was properly denied, that the denial of a change of venue was proper in the absence of any showing that any juror was biased because of pre-trial publicity, the trial court properly determined that the witness' brief exposure to television coverage of the trial did not affect the witness' testimony, and that the evidence was sufficient. Consequently, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and DAVID H. WELLES, J., joined.

Stephen M. Wallace, Blountville, Tennessee, for the appellant, Nicholas Allen Overbay.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Greeley Wells, District Attorney General and Barry P. Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The proof at trial, as accredited by the jury's verdict, established that Appellant and Corey A. Osborne met the victims, Joshua Tilson and Bruno Petrovic, at a parking lot near the trail head at Warrior's Path State Park on Cedar Branch Road at around 5:15 p.m. on Christmas Day of 2004. When the victims arrived, Appellant shot Mr. Tilson once in the head with a gun that the men took earlier that day from Mr. Osborne's grandmother. Appellant then shot Mr. Petrovic three times as he ran away from the scene. Appellant and Mr. Osborne fled the area, ending up in New Orleans, Louisiana in time for New Year's Eve. As the investigation progressed, police were able to track the men down. Appellant and Mr. Osborne were arrested in New Orleans on January 3, 2005. The murder weapon was found in the car that Appellant and Mr. Osborne had parked in a nearby casino parking garage.

After their arrest, Appellant and Mr. Osborne were transported back to Tennessee where they were indicted in June of 2005 for first degree murder and attempted first degree murder by the Sullivan County Grand Jury. Prior to trial, Mr. Osborne entered into a plea agreement whereby he agreed to testify at trial against Appellant. Mr. Osborne pled guilty to conspiracy to commit first degree murder and attempted first degree murder, for an effective sentence of 50 years as a Range I, standard offender with a thirty percent release eligibility.

At trial, Mr. Osborne was the chief prosecution witness. Mr. Osborne's testimony was corroborated by the testimony of Mr. Petrovic. Mr. Petrovic admitted that prior to December 24, 2004, he sold and smoked marijuana and had participated in trafficking illegal guns. According to Mr. Petrovic, Mr. Tilson also sold and smoked marijuana. Mr. Osborne had tried to buy a gun from Mr. Petrovic, but he refused to sell Mr. Osborne a weapon.

According to Mr. Petrovic, he and Appellant were friends at one time. Their relationship took a downturn when Mr. Petrovic heard rumors that Appellant was a "snitch" and was using crack cocaine. Mr. Petrovic continued to talk to Appellant but stated that they were not as close as they used to be. About two weeks prior to Christmas, Mr. Petrovic called Appellant and left a message on his answering machine, telling Appellant he wanted to "take it to another level." Apparently, Mr. Petrovic meant that he wanted Appellant to leave him alone. After Mr. Petrovic left that message, he, Appellant, Mr. Osborne, and Mr. Tilson met at Borden Park and smoked marijuana together. Appellant and Mr. Osborne continued to talk, but most of their conversations were about selling marijuana.

On Christmas Day, Mr. Tilson picked up Mr. Petrovic. They drove to Virginia to visit Mr. Tilson's grandparents before returning to Kingsport. Mr. Tilson dropped Mr. Petrovic off at his house. Around 4:00 p.m., Mr. Petrovic received a call from Appellant. Appellant wanted to get in touch with Mr. Tilson to sell him some speakers. Appellant wanted to meet them at 5:00 p.m. at the gravel parking lot off Cedar Branch Road.

Mr. Tilson picked up Mr. Petrovic, and they drove to the parking lot where they met Appellant and Mr. Osborne. Mr. Petrovic saw luggage in the back seat of Mr. Osborne's car. Mr. Petrovic asked about the speakers, and Mr. Osborne walked over to open the trunk of his car. When

Mr. Petrovic looked into the trunk, he heard a gunshot. When he turned around, he saw Appellant holding a gun. Mr. Tilson was falling to the ground. Mr. Petrovic asked Appellant what he was doing. Appellant told Mr. Petrovic to keep his distance because he had done this plenty of times before. Mr. Petrovic saw Mr. Osborne approaching him from behind, so he started running. As he ran through the woods, he was shot three times. At one point he fell, losing his cell phone. Mr. Petrovic made it to the home of Larry Daniels, where he asked for help.

At the conclusion of the jury trial, Appellant was found guilty of first degree murder for the death of Joshua Tilson and attempted first degree murder for the injuries to Mr. Petrovic. The trial court sentenced Appellant to life imprisonment for the first degree murder conviction and twenty years for the conviction for attempted first degree murder. Appellant appeals his convictions, raising several issues that he argues warrant relief.

Analysis

First, Appellant argues that the trial court improperly denied the motion to suppress the physical evidence seized as a result of the search of Mr. Osborne's car. Specifically, Appellant argues that he was not properly advised of his *Miranda* rights before being interrogated by police in New Orleans. He claims the illegal interrogation led to the discovery of Mr. Osborne's vehicle and the location of the murder weapon. The trial court determined that Appellant's statement to police should be suppressed but that the vehicle would have been inevitably discovered at some point because it was parked in a garage, and the car would have been impounded by local authorities. Appellant and Mr. Overbay could not afford to remove the vehicle. According to Appellant, the fact that Appellant was not properly given *Miranda* warnings prior to interrogation should have led to the suppression of the physical evidence seized as a result of the interrogation. The State, on the other hand, contends that the trial court properly overruled the motion under the "inevitable discovery doctrine."

Prior to trial, Appellant filed a motion to suppress the evidence in which he argued that when he was arrested he was not in close proximity to the car in which he and Mr. Osborne traveled and that the car was searched without permission and without a proper warrant. The trial court held a hearing on the motion to suppress. At the hearing, the trial court heard testimony from New Orleans Police Detective Dennis DeJean. Detective DeJean testified that on January 3, 2005, he prepared a search warrant for the vehicle. A commander informed him that the vehicle was identified as the one listed in a fugitive warrant from Sullivan County, Tennessee. The fugitive warrant included a "be on the lookout for" two individuals, Appellant and Mr. Osborne, as well as the car they were last seen driving, a green 1996 Honda Civic. New Orleans authorities also had the vehicle's tag number.

Detective DeJean learned that Appellant and Mr. Osborne had been taken into custody and placed under arrest approximately one block away from the parking garage where the car was parked. Detective DeJean was also notified that the car had been seized. The Honda was moved from the parking garage to an open-air parking lot across the street that was used by the New Orleans Police Department.

Detective DeJean prepared the application for the search warrant. He received information from Officer Seymore regarding the description of the vehicle including the license tag number and the Vehicle Identification Number. The information was provided to the New Orleans Police Department by the Sullivan County Sheriff's Department. When the search warrant was executed, a gun was seized from the car.

According to Detective DeJean, the parking garage was a "multi-story enclosed parking garage" that is utilized by the general public. Vehicles are towed from the garage from "time to time" when they are left in the garage. The New Orleans city towing policy is that a "copy of the tow sheet or impound sheet from a private tow company" is provided to the city and submitted through the police department where they are reviewed and checked for "stolen" or "wanted" vehicles.

Captain Reece Christian of the Sullivan County Sheriff's Department testified that he was involved in the murder investigation and that Appellant and Mr. Osborne were developed as suspects. Information from the investigation led authorities to believe that the two suspects had fled Tennessee. The vehicle description and VIN number were entered into the NCIC database along with a "juvenile pick-up order." The suspects were traced to New Orleans after Mr. Osborne made a call to his mother from a ferry terminal in New Orleans. On January 3, 2005, the suspects were detained by the New Orleans Police Department. Officers from the Sullivan County Sheriff's Office traveled to New Orleans to retrieve the vehicle. Once the vehicle was returned to Tennessee, a search warrant was issued allowing a further search of the vehicle.

Appellant testified at the hearing on the motion to suppress. According to Appellant, when he was arrested by the police in New Orleans, he was not advised of any rights. The police asked him "where the car was located and . . . where the gun was located." Appellant told authorities where the car was located.

At the conclusion of the hearing, the trial court determined that Appellant was "not advised of his constitutional rights or his *Miranda* warnings but . . . that the New Orleans officers acting on this information from Sullivan County properly arrested [Appellant]." Further, the trial court determined that "the vehicle would eventually have been discovered after the defendants had been arrested, if not by the police department it would have been by the authorities there that would have impounded the car." In other words, the trial court found that "inevitably this car would have been located." As a result, the trial court granted the motion to suppress Appellant's statement but denied the motion to suppress the evidence found as a result of the search of the vehicle.

"This Court will uphold a trial court's findings of fact in a suppression hearing unless the evidence preponderates otherwise." *State v. Hayes*, 188 S.W.3d 505, 510 (Tenn. 2006) (citing *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). On appeal, "[t]he prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted

to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. Our review of a trial court's application of law to the facts is de novo, with no presumption of correctness. *State v. Walton*, 41 S .W.3d 75, 81 (Tenn. 2001) (citing *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999); *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997)). When the trial court's findings of fact are based entirely on evidence that does not involve issues of witness credibility, however, appellate courts are as capable as trial courts of reviewing the evidence and drawing conclusions and the trial court's findings of fact are subject to de novo review. *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000). Further, we note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998).

In *United States v. Patane*, 542 U.S. 630 (2004), the United States Supreme Court determined that the failure to give *Miranda* warnings does not require suppression of physical fruits of the suspect's unwarned but voluntary statements. *See also State v. Walton*, 41 S.W.3d 75 (Tenn. 2001) (rejecting "a per se exclusionary rule, which would automatically exclude non-testimonial evidence obtained from a technical failure to give *Miranda* warnings" in favor of a procedure where by a defendant may seek suppression of non-testimonial evidence discovered when *Miranda* warnings are not given only when the statements are the product of an actual violation of the privilege against self-incrimination). Specifically, in *Patane*, the defendant was on bond, subject to a temporary restraining order that prohibited him from contacting his ex-girlfriend. 542 U.S. at 633. The defendant apparently violated the restraining order. At the same time, the defendant, also a convicted felon, was reported to illegally have possession of a Glock pistol. *Id.* Officers went to the defendant's residence and inquired about his attempts to contact his ex-girlfriend in violation of the restraining order. The defendant was arrested. *Id.* at 635. One of the officers attempted to *Mirandize* the defendant when he was interrupted by the defendant who assured the officers that he knew his rights. The defendant was then questioned about the Glock. The defendant was "reluctant," telling the officers that he was not sure if he should say anything because he did not want the gun taken away from him. *Id.* When the officers persisted, the defendant admitted that the gun was in the bedroom. The defendant gave them permission to get the gun. The defendant argued on appeal that the gun should be suppressed because the officers lacked probable cause to arrest him and that it was the fruit of a statement given without *Miranda* warnings. The Supreme Court determined that:

> statements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial, *see Elstad, supra*, at 307-08, 105 S. Ct. 1285; *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L.Ed.2d 1 (1971), though the fruits of actually compelled testimony cannot, see *New Jersey v. Portash*, 440 U.S. 450, 458-59, 99 S. Ct. 1292, 59 L.Ed.2d 501 (1979). More generally, the *Miranda* rule "does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted," *Elstad*, 470 U.S., at 307, 105 S. Ct. 1285. Such a blanket suppression rule could not be justified by reference to the "Fifth Amendment goal of assuring trustworthy evidence" or by any deterrence rationale, *id.,* at 308, 105 S. Ct. 1285 ; see *Tucker*, *supra*, at 446-449, 94 S.Ct. 2357;

> *Harris*, *supra*, at 225-26, and n. 2, 91 S. Ct. 643, and would therefore fail our close-fit requirement.
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> . . . .
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> Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, "[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy" for any perceived *Miranda* violation. *Chavez, supra*, at 790, 123 S. Ct. 1994 (Kennedy, J., concurring in part and dissenting in part). See also H. Friendly, Benchmarks 280-82 (1967). There is simply no need to extend (and therefore no justification for extending) the prophylactic rule of *Miranda* to this context.

Patane, 542 U.S. at 639-43.

The same rationale applies herein. We agree with Appellant that he was not properly given *Miranda* warnings by police upon his arrest in New Orleans. Consequently, the trial court properly suppressed the actual statements made by Appellant to the police. The admission of the car found as a result of Appellant's inadmissible statement, however, does not violate Appellant's constitutional rights. Appellant told the police where the car was located without being coerced. The trial court properly denied the motion to suppress. Appellant is not entitled to relief on this issue.

Venue

Next, Appellant claims that the trial court erred in failing to grant his motion to change venue, which ultimately resulted in the "empanelling of a prejudiced jury." Specifically, Appellant argues that he was "forced" to use all of his peremptory strikes to exclude potential jurors who were "biased by pre-trial media coverage" but that the strikes did not remove the "prejudicial taint visited upon the jury by the extensive pre-trial media coverage." As a result, Appellant claims that he was tried and convicted by a prejudiced jury. The State disagrees, countering that the trial court properly took the matter of venue under advisement and correctly decided that venue was proper after a jury was successfully seated in Sullivan County.

> A change of venue may be granted "when a fair trial is unlikely because of undue excitement against the defendant in the county where the offense was committed or for any other cause." Tenn. R. Crim. P. 21(a) (2006). A motion for change of venue is left to the sound discretion of the trial court and the court's ruling will be reversed on appeal only upon a clear showing of an abuse of that discretion. *State v. Howell*, 868 S.W.2d 238, 249 (Tenn. 1993); *State v. Hoover*, 594 S.W.2d 743, 746 (Tenn. Crim. App. 1979). The mere fact that jurors have been exposed to pretrial publicity

> will not warrant a change of venue. *State v. Mann*, 959 S.W.2d 503, 531-32 (Tenn. 1997). Similarly, prejudice will not be presumed on the mere showing of extensive pretrial publicity. *State v. Stapleton*, 638 S.W.2d 850, 856 (Tenn. Crim. App. 1982). In fact, jurors may possess knowledge of the facts of the case and may still be qualified to serve on the panel. *State v. Bates*, 804 S.W.2d 868, 877 (Tenn. 1991). Before a conviction will be overturned on a venue issue, the appellant must demonstrate on appeal that the jurors were biased or prejudiced against him. *State v. Melson*, 638 S.W.2d 342, 360-61 (Tenn. 1982). The test is whether the jurors who actually sat on the panel and rendered the verdict and sentence were prejudiced. *State v. Kyger*, 787 S.W.2d 13, 18-19 (Tenn. Crim. App. 1989). This Court has noted that:
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> "[E]xtensive knowledge in the community of either the crimes or the putative criminal is not sufficient by itself to render a trial unconstitutionally unfair," and the court may not presume unfairness based solely upon the quantity of publicity "in the absence of a 'trial atmosphere . . . utterly corrupted by press coverage.'"
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> *State v. Crenshaw*, 64 S.W.3d 374, 387 (Tenn. Crim. App. 2001) (quoting *Dobbert v. Florida*, 97 S.Ct. 2290, 2303 (1977) (quoting *Murphy v. Florida*, 432 U.S. 282, 303 (1975))). The burden of proof is on the defendant to show that the jurors were biased or prejudiced against him. *Id.* at 394; *see also State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984); *State v. Garland*, 617 S.W.2d 176, 187 (Tenn. Crim. App. 1981). Furthermore, the scope and extent of voir dire is left to the sound discretion of the trial court. *State v. Smith*, 993 S.W.2d 6, 28 (Tenn. 1999). Jurors who have been exposed to pretrial publicity may sit on the panel if they can demonstrate to the trial court that they can put aside what they have heard and decide the case on the evidence presented at trial. *State v. Gray*, 960 S.W.2d 598, 608 (Tenn. Crim. App. 1997).

State v. William Glenn Rogers, No. M2002-01798-CCA-R3-DD, 2004 WL 1462649, at *19 (Tenn. Crim. App., at Nashville, Jun. 30, 2004), *reh'g denied*, (Tenn., Aug. 27, 2004).

Relevant factors to consider in determining whether to grant a motion for a change of venue include: (1) nature, extent, and timing of pre-trial publicity; (2) nature of publicity as fair or inflammatory; (3) the particular content of the publicity; (4) the degree to which the publicity complained of has permeated the area from which the venire is drawn; (5) the degree to which the publicity circulated outside the area from which the venire is drawn; (6) the time elapsed from the release of the publicity until the trial; (7) the degree of care exercised in the selection of the jury; (8) the ease or difficulty in selecting the jury; (9) the veniremen's familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire; (10) the defendant's utilization of his peremptory challenges; (11) the defendant's utilization of his challenges for cause; (12) the participation by police or by prosecution in the release of publicity; (13) the severity of the offense

charged; (14) the absence or presence of threats, demonstrations or other hostility against the defendant; (15) size of the area from which the venire is drawn; (16) affidavits, hearsay, or opinion testimony of witnesses; (17) nature of the verdict returned by the trial jury. *Hoover*, 594 S.W.2d at 746.

Again, jurors may sit on a case even if they have formed an opinion assuming the trial court is satisfied that the juror is able to set aside the opinion and render a verdict based upon the evidence presented in court. *State v. Brown*, 836 S.W.2d 530, 549 (Tenn. 1992). Moreover, for there to be a reversal of a conviction based upon a claim that the trial court improperly denied a motion for a change of venue, the "defendant must demonstrate that the jurors who actually sat were biased or prejudiced against him." *State v. Evans*, 838 S.W.2d 185, 192 (Tenn. 1992).

Consequently, we must examine the impartiality of the trial jurors in the case herein. The trial court allowed a thorough voir dire of potential jurors by attorneys for both Appellant and the State. While at least sixteen of the potential jurors indicated that they had some knowledge of the case, no jurors claimed to have a preconceived opinion on the guilt or innocence of Appellant. Appellant has failed to show that the jury was actually biased or prejudiced against him. We determine that the trial court did not abuse its discretion in denying the motion for change of venue. Appellant is not entitled to relief on this issue.

Testimony of Mr. Osborne

Appellant contends on appeal that the trial court erred when it refused to exclude the testimony of Mr. Osborne after it was discovered that he watched portions of the trial live on Court TV in a jail holding cell prior to testifying. Specifically, Appellant argues that he was prejudiced by Osborne's exposure to the trial, in that Osborne presented "a version of events conducive to the State's theory of the case." The State argues, on the other hand, that the trial court did not err in allowing Mr. Osborne to testify after finding that any error was harmless and that no prejudice had been shown to Appellant.

Tennessee Rule of Evidence 615 states, in pertinent part, that "[a]t the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing." Trial judges have always been afforded wide discretion in determining whether to impose the sanction of excluding the evidence of the witness suspected of having violated what is familiarly known as "the rule." *State v. Moffett*, 729 S.W.2d 679, 681 (Tenn. Crim. App. 1986); *see also State v. Anthony*, 836 S.W.2d 600, 604-605 (Tenn. Crim. App. 1992). The Tennessee Supreme Court has said that "[t]he purpose of the rule is to prevent one witness from hearing the testimony of another and adjusting his testimony accordingly." *State v. Harris*, 839 S.W.2d 54, 68 (Tenn. 1992) (citing *Smith v. State*, 554 S.W.2d 648, 651 (Tenn. Crim. App. 1977)). We have previously explained the authority of the trial court in considering alleged violations of the rule:

> Rule 615 does not prescribe a specific sanction for its violation. Instead, courts retain the discretion to impose a variety of sanctions appropriate to the circumstances. *State*

> *v. Anthony*, 836 S.W.2d 600, 605 (Tenn. Crim. App. 1992); see also N. Cohen et al., *Tennessee Law of Evidence* § 6.15[11][b] (4th ed. 2000). The trial court may, as a sanction, exclude the testimony of a witness who hears other testimony while subject to a sequestration order. *See State v. Weeden*, 733 S.W.2d 124, 125 (Tenn. Crim. App. 1987). The decision to exclude or allow the testimony is a matter within the discretion of the trial court, subject to a showing of abuse and prejudice to the complaining party. *State v. Chadwick*, 750 S.W.2d 161, 166 (Tenn. Crim. App. 1987).

State v. Black, 75 S.W.3d 422, 424-25 (Tenn. Crim. App. 2001).

In the case herein, the trial court was informed by court officers that the State's witness, Mr. Osborne, had been inadvertently exposed to live Court TV footage of the trial while waiting to testify. When the court officers realized the nature of the programming, they moved Mr. Osborne to a holding area where he did not have access to television.

Counsel for Appellant moved for the exclusion of the testimony of Mr. Osborne, arguing that by watching the trial unfold, he could tailor his testimony to match the theory of the State. During a jury-out hearing, Mr. Osborne testified that while he was waiting to testify at trial, he was watching a television located in the middle of the day room. The television was turned on at 9:00 a.m. Mr. Osborne claimed that he and his fellow prisoners did not notice until around 9:30 a.m. that Court TV was airing Appellant's trial live. Mr. Osborne claimed that he saw most of the testimony of Landon Bellamy and part of the testimony of Detective Russell. Mr. Osborne stated that he did not see opening arguments and that he did not hear or see anything during the broadcast that he was not aware of prior to trial.

The trial court also heard testimony from inmates Mark Faulk and Larry Kidd. Mr. Faulk turned on the television a few minutes after 9:00 a.m. Mr. Faulk claimed that he saw the opening arguments and that Mr. Osborne was trying to get him to turn the volume down so that no one else would see him watching the broadcast. Mr. Kidd testified that they watched the opening arguments and continued to watch until approximately 10:30 a.m.

At the conclusion of the hearing, counsel for Appellant asked that the testimony of Mr. Osborne be excluded on the basis that it violated "the rule." The State noted that the sequestration rule had not been invoked for the purposes of trial. The trial court determined that Mr. Faulk was certainly not a credible witness but that the evidence supported the assertion that Mr. Osborne definitely watched a portion of the trial. However, the trial court determined that the testimony "that he would have been exposed to" would have resulted in harm that was "minimal because the description of the crime scene, the finding of various items of evidence, those issues are not really matters that are disputed facts." The trial court found that Mr. Osborne's testimony was certainly important to the trial but that neither party was at fault in exposing Mr. Osborne to the trial coverage. Lastly, the trial court determined that the prejudice to Appellant was "minimal" because the facts that Mr. Osborne was exposed to were not disputed issues of fact. We agree. There was not a showing

of abuse or prejudice to Appellant, so the decision to allow the testimony was within the discretion of the trial court. *Chadwick*, 750 S.W.2d at 166. Appellant is not entitled to relief on this issue.

Motion for Judgment of Acquittal

Lastly, Appellant complains that the trial court improperly denied his motion for judgment of acquittal. Specifically, Appellant contends that the State failed to prove premeditation and that "no evidence exists that the shootings were done in anything other than a spur of the moment decision." The State suggests that the evidence was sufficient to establish premeditation.

According to Tennessee Rule of Criminal Procedure 29(b):

> On defendant's motion on its own initiative, the count shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

This Court has noted that "[i]n dealing with a motion for judgment of acquittal, unlike a motion for a new trial, the trial judge is concerned only with the legal sufficiency of the evidence and not with the weight of the evidence." *State v. Hall*, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983). The standard for reviewing the denial or grant of a motion for judgment of acquittal is analogous to the standard employed when reviewing the sufficiency of the convicting evidence after a conviction has been imposed. *State v. Ball*, 973 S.W.2d 288, 292 (Tenn. Crim. App. 1998); *State v. Adams*, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995).

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W .2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reevaluations the evidence when considering the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions concerning

the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual issues raised by such evidence, are resolved by the trier of fact and not the appellate courts. *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990).

First degree murder is defined as:

> (1) A premeditated and intentional killing of another;
> (2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or

(3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.

T.C.A. § 39-13-202(a). Tennessee Code Annotated section 39-13-202(d) provides that:

> "[P]remeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

T.C.A. § 39-13-202(d). An intentional act requires that the person have the desire to engage in the conduct or cause the result. *Id.* § 39-11-106(a)(18). Whether the evidence was sufficient depends entirely on whether the State was able to establish beyond a reasonable doubt the element of premeditation. *See State v. Sims*, 45 S.W.3d 1, 7 (Tenn. 2001); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999). Whether premeditation is present is a question of fact for the jury, and it may be inferred from the circumstances surrounding the killing. *State v. Young*, 196 S.W.3d 85, 108 (Tenn. 2006); *see also State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000); *State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998).

Premeditation may be proved by circumstantial evidence. *See, e.g., State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992). Our high court has identified a number of circumstances from which the jury may infer premeditation: (1) the use of a deadly weapon upon an unarmed victim; (2) the particular cruelty of the killing; (3) the defendant's threats or declarations of intent to kill; (4) the defendant's procurement of a weapon; (5) any preparations to conceal the crime undertaken before the crime is committed; (6) destruction or secretion of evidence of the killing; and (7) a defendant's calmness immediately after the killing. *See State v. Bland*, 958 S.W.2d 651, 660 (Tenn. 1997); *Pike*, 978 S.W.2d at 914-15. This list, however, is not exhaustive and serves only to demonstrate that premeditation may be established by any evidence from which the jury may infer that the killing was

done "after the exercise of reflection and judgment." T.C.A. § 39-13-202(d); *see Pike*, 978 S.W.2d at 914-15; *Bland*, 958 S.W.2d at 660.

One learned treatise states that premeditation may be inferred from events that occur before and at the time of the killing:

> Three categories of evidence are important for [the] purpose [of inferring premeditation]: (1) facts about how and what the defendant did prior to the actual killing which show he was engaged in activity directed toward the killing, that is, *planning activity*; (2) facts about the defendant's prior relationship and conduct with the victim from which *motive* may be inferred; and (3) facts about the *nature of the killing* from which it may be inferred that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a preconceived design.

2 Wayne R. LaFave, *Substantive Criminal Law* § 14.7(a) (2d ed. 2003) (emphasis in original).

The proof at trial established that Appellant shot and killed Mr. Tilson and attempted to kill Mr. Petrovic. Neither man was armed at the time of the attack, and Appellant contacted the men and asked them to meet him at the parking lot under the guise of selling them some car stereo equipment. Appellant asked Mr. Osborne about getting a gun. Mr. Osborne procured the weapon from his grandmother's bedroom, but Appellant was in control of the weapon at the time of the murder. Appellant even continued to shoot at Mr. Petrovic as he ran away from the scene. According to Mr. Osborne, Appellant wanted to kill Mr. Petrovic and Mr. Tilson because they started a rumor that he was a "snitch." When Appellant and Mr. Osborne left the scene of the crime, they left the state under the belief that both of the victims were dead. We conclude that from this evidence, a rational jury could conclude that the evidence is sufficient to support a conviction for first degree premeditated murder. Appellant is not entitled to relief on this issue.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE